Supreme Court, U.S.
FILED

051131 MAR 6 - 2006

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No.

IN THE

Supreme Court of the United States

FREDDY GREEN, PETITIONER

v.

ELIXIR INDUSTRIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether summary judgment dismissing a civil rights plaintiff's cause of action for racial harassment is proper when the sole basis for the grant of summary judgment was the Court's determination that words specifically describing racial harassment were not listed on the EEOC charge form along with the language describing racial discrimination upon termination of the plaintiff, when the plaintiff acted pro se in filing the EEOC claim and where, in response to the motion for summary judgment, the plaintiff testified under oath that detailed information regarding racial harassment have been provided to the EEOC orally and in writing to the EEOC by the plaintiff?

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OPINIONS BELOW

The Eleventh Circuit Court of Appeals issued two opinions in this case. The first opinion was issued on April 29, 2005. That opinion was stamped to be published, but was never published. That opinion granted the relief sought by the petitioner Freddy Green. More than five months later, after requesting additional briefs from the parties, the Eleventh Circuit Court of Appeals issued a second opinion on October 11, 2005, which opinion was stamped not to be published. Both opinions are reproduced in the appendix at 1a and 17a.

JURISDICTION

The Court of Appeals Judgment was entered on October 11, 2005. A timely petition for rehearing was denied on December 6, 2005. Appendix at 63a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

See Appendix.

STATEMENT

The fact that two opinions were issued by the Eleventh Circuit Court of Appeals demonstrates the manner in which the Petitioner herein, Freddy Green, has been denied justice as a result of the trial court's dismissal of his claim for racial harassment solely because those two words, racial harassment, did not appear on the EEOC charge form, which Mr. Green

signed himself but which was given to him by the EEOC. This is illustrated in the first opinion of the Eleventh Circuit and throughout the Briefs filed in this case. Mr. Green filed an affidavit in response to the Defendant's Motion for Summary Judgment which sought to dismiss the claim for hostile work environment. In that affidavit Petitioner showed that he discussed the allegations with the EEOC investigator and informed him of the racial harassment. The most telling and damaging conduct was the display of hangman nooses in the work place. Mr. Green also testified in his affidavit that he provided the same information to the EEOC in writing and that he believed that the details of harassment would be included in the EEOC investigation.

Petitioner pointed out to the District Court and to the Eleventh Circuit Court of Appeals a companion case, *Dennis v Elixir Industries*, No. CV501-84, Southern District of Georgia, in which the same Motion for Summary Judgment was filed by the same defendant arising out of the same factual situation. The trial court in that case denied the respondent's Motion for Summary Judgment. The only difference was that the plaintiff in that case had been able to obtain from the EEOC the written documents that had been presented on the hostile work environment claim to the EEOC. Unfortunately, Mr. Green had been unable to obtain his file before it had been destroyed.

Unlike the first opinion by the Eleventh Circuit Court of Appeals, the second opinion simply ignores the evidence which was presented in response to the respondent's motion for summary judgment and falls back into what could be characterized as only a form

over substance result. That is, the one sheet of paper containing the charge is the only basis for the Eleventh Circuit's affirmation of the trial court's grant of summary judgment. The second opinion, unlike the first, does not mention the companion case of *Dennis v. Elixir*. The second decision also does not address the fact that at no point during the defendant's motion for summary judgment did the defendant offer any evidence that the racially hostile work environment claim was not investigated by the EEOC.

This case was tried in the Southern District of Georgia with the only issue allowed concerning the racial discrimination upon determination. The Eleventh Circuit has ignored the results of the jury trial. Although the claim of a racially hostile work environment had not been allowed to proceed to the jury, some evidence of racial harassment, including the hangman nooses, had been placed into evidence in support of the racial discrimination upon the termination claim. Appendix 12a. While the jury did not find sufficient evidence that the termination was racially based, the jury indicated its acceptance of the fact that racial harassment had been occurring by submitting the following statement to the Court: "We feel that there are racial issues in the company and need to be addressed with the heads of this company about the Douglas, Georgia branch."

The second opinion of the Eleventh Circuit Court of Appeals in this case states that it is reviewing the "grant of summary judgment *de novo*." Appendix 20a. Despite this statement, the Eleventh Circuit refused to accept as true the testimony of Freddy Green by affidavit, which is required on summary

judgment, that he did indeed submit all of the information concerning the racial harassment incidents to the EEOC. Instead, the Eleventh Circuit's second opinion focuses solely on the language contained in the charge form. The Eleventh Circuit's second opinion made this conclusion despite having stated in the first opinion the following: "Elixir had, or should have had, ample notice of the racially hostile working conditions at its plant. It is disingenuous for Elixir to plead ignorance because Green did not include each specific act of harassment on his EEOC charge form." Appendix 12a.

REASONS FOR GRANTING OF THE PETITION

A. The Eleventh Circuit Opinion undermines justice by using form over substance and ignoring evidence presented by the petitioner

The Eleventh Circuit has created an anomaly of opinions in this case which results in a failure to address the injustice received by the Petitioner. Unfortunately, the first opinion, which was to be published, has now been substituted by a new opinion which is not to be published. The importance of the issue in this case is that the Petitioner presented sworn testimony that he did provide to the EEOC his allegations of racial harassment, including hangman nooses. This evidence was not contradicted by the respondent.

In both opinions by the Eleventh Circuit, reliance is placed upon the case of *Gregory v. Georgia Department of Human Resources*, 355 F. 3rd 1277, 11th

Cir.—2004. The Court quoted from Gregory the following purpose of the EEOC filing requirement: "[T]hat the EEOC 'should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance in promoting conciliation efforts.' " Appendix 8a. In the second opinion of the Eleventh Circuit, however, instead of relying upon this basic principle of the purpose of the EEOC investigation, the Court focused solely on what words or what boxes were checked on the EEOC charge form. The second opinion clearly relied upon form over substance.

The Eleventh Circuit in its initial decision made the following statement: "The proper inquiry, as these cases make clear, is whether the complaint is 'like or related to, or grew out of' the allegations in the EEOC charge." Appendix 12a. The Eleventh Circuit initially found that the petitioner's harassment and termination claims were "inextricably intertwined". Appendix 12a.

The second decision of the Eleventh Circuit clearly took into consideration the evidence submitted by the petitioner that he did indeed submit evidence of racial harassment to the EEOC. That the words "racial harassment" did not appear on the form itself were not dispositive of the issue since evidence was presented that the EEOC was in fact informed of these allegations. None of the cases relied upon by the second opinion of the Eleventh Circuit contained this specific issue, including *Gregory* and *Sanchez v. Standard Brands, Inc.*, 431 F. 2nd 455 5th Cir. (1970). Additionally, the second opinion of the Eleventh Circuit failed to even consider *Wilkerson v. Grinnell Corporation*, 270 F. 3d 1314 (11th Cir. 2001), a decision

which had been relied upon in the first opinion. *Wilkerson* was cited in the first opinion for the principle that the EEOC charge requirement has as its primary purpose to provide notice to the employer of the allegations against it. In this case, it was the EEOC who prepared the charge form and who failed to properly fill in the charge form while having before it the evidence of contentions of racial harassment, including hangman nooses, supplied to it by the petitioner orally and in writing. That evidence was simply ignored by the second opinion of the Eleventh Circuit.

Instead of addressing the issue raised by the petitioner, the Eleventh Circuit Court of Appeals second opinion in this case focuses solely on the charge form and refuses to consider the evidence submitted by the petitioner in response to the motion. Pro se employees who file an EEOC claim would have no knowledge of how much information should be on a charge form. The lay person who signs a charge form which contains reference to termination on racial grounds, who also believes that they have been harassed for racial reasons on the job, could easily conclude such a charge form to have included all of the claims regarding race. This is particularly true when the employee testifies that he did discuss with the investigator the other evidence of racial harassment in the work environment, along with testifying that he submitted written documentation containing this information to the investigator.

Additionally, the Eleventh Circuit's second opinion fails to address the companion case which was filed by the Petitioner's co-worker against the same